85-277

Supreme Court, U.S.
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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ROBERT WALTER GOVERN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Herbert T. Schwartz
SCHWARTZ & WILSON
711 N.W. 23rd Avenue, Suite #4
P. O. Box 1292
Gainesville, Florida 32602
(904) 378-2681
Counsel of Record for Petitioner

Questions Presented for Review

1. Whether the Court below abused its discretion in summarily denying, without a hearing, Appellant's motion under Rule 35 for sentence modification or reduction when:

(a) The government entered into a cooperation agreement with the Petitioner, under which the government promised to recommend sentence modification including immediate eligibility for parole pursuant to 18 U.S.C. 4205(b)(2), in exchange for the Petitioner's cooperation concerning the investigation of criminal activity.

(b) The Petitioner fully cooperated with the government, placing his life in peril and risking the safety of his family.

(c) The government refused to honor the cooperation agreement, alleging that the Petitioner failed to fully

cooperate.

2. Whether failure to provide the Petitioner with an evidentiary hearing to determine whether the agreement was breached results in a denial of due process.

Parties to the Proceeding in the United States Court of Appeals for the Eleventh Circuit

Petitioner Govern is a party to the proceeding in the United States Court of Appeals for the Eleventh Circuit, the order of which is sought to be reviewed. The other party to the proceeding in the Court of Appeals is the Respondent, The United States.

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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1985

ROBERT WALTER GOVERN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on June 28, 1985, which affirmed the District Court's judgment

denying Petitioner's motion for reduction of sentence pursuant to Rule 35 of Federal Rules of Criminal Procedure.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, entered on June 28, 1985, affirming the order of the United States District Court for the Middle District of Florida denying Petitioner's motion, was not reported. It is reproduced in the Appendix (1a). The order of the District Court is reproduced in the Appendix (2a). The order denying Petitioner's motion for reconsideration is reproduced in the Appendix (3a).

JURISDICTION

The order of the United States Court of Appeals for the Eleventh Circuit affirming the District Court's order was entered on June 28, 1985. This petition was timely

filed within 60 days from that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1)

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 4205(b)(2):

Upon entering a judgment of conviction, the Court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, the Court may fix the maximum sentence of imprisonment to be served in which event the Court may specify that the prisoner may be released on parole at such time as the Commission may determine.

STATEMENT OF THE CASE

The Government's refusal to honor a cooperation agreement it entered into with the Petitioner

The Petitioner was convicted under an eighteen-count indictment relating to a large-scale marijuana distribution network. Following the Eleventh Court's denial of a petition for rehearing and suggestion for rehearing en banc, the judgment of conviction below was affirmed and the mandate issued on August 27, 1984. Petitioner then filed a timely motion for sentence modification or reduction under Rule 35, Federal Rules of Criminal Procedure. The Government responded in opposition, Petitioner replied, and the District Court denied Appellant's motion without a hearing on December 20, 1984. The District Court denied Petitioner's motion to reconsider its ruling on January 10, 1985.

The undisputed facts are as follows. While Petitioner Govern's appeal from conviction in Case Number 82-3167 was still pending, the Government determined that he could provide valuable information with respect to ongoing criminal investigations. Since cooperation by the Petitioner would ultimately lead to the exposure of several key criminal figures, the Petitioner was justifiably concerned with his safety and the safety of his family. Consequently, the Government and Petitioner negotiated an agreement under which Petitioner would cooperate with the Government in exchange for the Government's promise to make Petitioner's cooperation known to the Court, and to recommend that his sentence be modified to include immediate eligibility for parole pursuant to 18 USC 4205 (b)(2). This agreement was reduced to writing in

a 3-page letter signed by counsel for Appellant and the Government (See Appendix 4a).

Petitioner then submitted to a three-day debriefing session in July of 1983, reviewed a 113-page indictment pending in the Eastern District of Texas, prepared a detailed written summary of his knowledge of matters contained in that indictment, and voluntarily appeared before a Grand Jury in Orlando, Florida, at the request of the Government in June of 1984. The Government acknowledged that it was satisfied with the Petitioner's testimony before the Orlando Grand Jury and that the Petitioner had testified fully and truthfully. (Appendix 5a).

While the Government admitted the existence of the cooperation agreement, including the provision relating to recommending sentence reduction to include

immediate parole eligibility under 18 U.S.C. 4205(b)(2), the Government expressly recommended against modification of Petitioner's sentence.

The District Court denied Petitioner's Rule 35 motion for a reduced sentence and request for a hearing. The denial, without a hearing, constituted a clear abuse of the Court's discretion.

REASONS FOR ALLOWANCE OF THE WRIT

I. The decision below represents an important question of federal law - whether the Government may enter into a cooperation agreement and then unilaterally and arbitrarily refuse to honor it without being required to establish its position at an evidentiary hearing

In New York v. Santabello, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1972), this Court acknowledged that conditions for a valid plea presuppose fairness in securing agreement between an accused and a prosecutor. This Court further held that when a plea rests in any significant degree

on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. Id. at 262, 92 S.Ct. at 499. In the present case, the Petitioner's willingness to testify was clearly induced by the prosecutor's promise to recommend sentence reduction or modification under 18 U.S.C. 4205(b)(2). Since Petitioner Govern's testimony would inevitably expose several members of the drug-trafficking trade, the Petitioner was justifiably concerned for his safety and the safety of his family. While this was not a ground for refusing to testify under the law, the potential sanction of contempt lacked significance under the circumstances, since the Petitioner had already received a sentence of 45 years imprisonment. Of greater significance, however, is the fact that the Petitioner fully complied with

the terms of the agreement.

In Mabry v. Jones, __U.S.__, 104 S.Ct. 2543 (1984), this Court held that the withdrawal of an offer by the prosecutor prior to a plea is without constitutional significance. This Court reasoned that since the plea in Mabry occurred subsequent to the prosecution's breach of promise, the petitioner was in no worse position than he would have been in had he been permitted to replead. Conversely, in the present case, the breach of promise occurred subsequent to the Petitioner's compliance with the cooperation agreement. Therefore, unlike Mabry, the inducement of the cooperation was the product of governmental deception. The Petitioner's cooperation, at the risk of harm to himself and to his family, was induced by the Government's promise to recommend sentence reduction.

The Government attempts to distinguish plea agreements from cooperation agreements by arguing that since the Petitioner was convicted prior to entering into the agreement, the Government's failure to honor the agreement has not resulted in the waiver of any constitutionally protected right. While this argument may seem plausible at first blush, it fails to recognize the similarity of principles which underlie both type of agreements. Both agreements are presumably based on notions of fair play and justice. In addition, both are severely undermined when the Government is permitted to act in bad faith to arbitrarily refuse to comply with its end of the bargain. Moreover, failure to comply with cooperation agreements will ultimately lead to less cooperation by those who can provide the Government with the greatest amount of information concerning criminal activity.

In U.S. v. Unterman, 433 F.Supp. 647 (S.D. N.Y. 1977), a factually similar case, the defendant agreed to provide the Government with information he had relating to criminal activity. In exchange for his cooperation, the defendant's request for a reduced sentence was granted. In Unterman, the determination to grant a reduced sentence was based upon two factors. First, the defendant made a genuine effort to cooperate with the Government. Id. at 648. Second, the defendant had been incarcerated for fifteen months. Id. In the present case, the Government has been unable to point to any specific misrepresentation or other breach of the agreement by Petitioner. On the contrary, a letter from the United States Attorney for the Middle District of Florida clearly indicates that the Petitioner testified fully and truthfully with respect to an ongoing criminal investiga-

tion. (Appendix 5a). Secondly, the Petitioner has already served more than 3 years. The Court's reasoning in Unterman is equally applicable to the facts of the present case. The Petitioner has provided the Government with what it bargained for — valuable information concerning criminal activity. The Government now wishes to look the other way. Lack of good faith on the part of the Government can only serve to undermine confidence in the criminal justice system and to reduce cooperation in the future.

II. This Court Has Not Decided Whether A Defendant Is Entitled to Specific Enforcement of a Cooperation Agreement or, Alternatively, Whether a Defendant Has A Constitutional Right to an Evidentiary Hearing For the Purpose of Determining Whether Such an Agreement Has Been Breached

In Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S.1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979), this

Court concluded that a legitimate expectation of release on parole may give rise to a protected liberty interest. In the present case, the Petitioner's expectations are clearly legitimate, since they are based on express promises made by the Government. Since a liberty interest is implicated, the Petitioner should be granted an evidentiary hearing to determine whether the agreement was breached. A defendant has a constitutional right to an evidentiary hearing when the terms of a plea agreement are in doubt. United States v. Simmons, 537 F.2d 1260 (4th Cir. 1976). The fact that Simmons involved a plea bargaining agreement is largely irrelevant to the extent that both cooperation agreements and plea bargaining agreements must be entered into in good faith by the Government.

Under the Fifth Amendment, no person may be deprived by the Government of

"liberty" without due process of law. Although a convicted prisoner stands lawfully deprived of much of the freedom to which he would otherwise be entitled, he is no longer treated like a slave, stripped of all protected liberty interest. Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 125, 97 S.Ct. 2532, 2537 (1977).

To qualify as constitutionally protected liberty, the prisoner's interest must be either one that is assured by statute, judicial decree or regulation, or one that he would normally expect to have as a matter of custom and practice or of fundamental decency and fairness. Sostre v. McGinnis, 442 F.2d 178, 194 (2d Cir. 1971). When the Government enters into an agreement, fundamental decency and fairness require a hearing to determine whether the agreement was breached.

Protected liberty interest is created when an inmate may reasonably expect to enjoy an important and substantial benefit upon his compliance with the occurrence of certain conditions, which may be withdrawn only for good cause. Pugliese v. Nelson, 617 F.2d 916 (2d Cir. 1980). For example, the liberty of a parolee, who has relied on an implicit promise that parole will be revoked only for good cause, includes many of the core values of liberty. The liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Morrisey v. Brewer, 408 U.S. 471,482, 92 S.Ct. 2593,2601 (1972).

In the present case, much more than a mere hope for the possibility of a reduced sentence exists. The Petitioner's expectations are based upon an express promise of a reduction recommendation by the Government. Therefore, an evidentiary hearing

for the purpose of determining whether the agreement was, in fact, breached is necessary.

Since the Petitioner has relied on express promises made by the Government, his position is not analogous to that of a public employee lacking sufficient permanency of status or liberty interest to entitle him to constitutional due process before being terminated. See Board of Regents v. Roth, 408 U.S. 564,577, 92 S.Ct. 2701,2709 (1972). In Roth, this Court held that requirements of procedural due process apply to deprivation of interests encompassed by Fourteenth Amendment's protection of liberty; when protected interests are implicated the right to some kind of prior hearing is paramount. 92 S.Ct. at 2705. Liberty is a broad and majestic term. 92 S.Ct. at 2706. To have a property interest in a benefit, a person must have more than

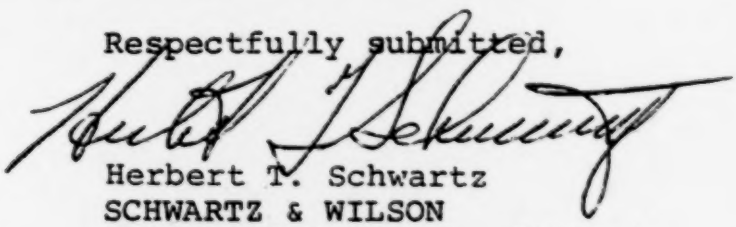
an abstract need or desire for it. He must have a legitimate claim of entitlement to it. 92 S.Ct. 15 2709. The Petitioner's claim of entitlement is clearly legitimate, since it is based on express promises made by the Government to recommend sentence reduction.

Fundamental fairness demands that those who enter agreements with the Government, especially at the risk of losing their lives, should feel confident that the Government will be required to comply with the terms of that agreement. Since the Government contends that the Petitioner did not comply with the terms of the agreement, fundamental fairness and due process requires that the Petitioner be provided with a hearing to determine whether the agreement was breached.

CONCLUSION

A writ of certiorari should issue to review the order of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,



Herbert T. Schwartz
SCHWARTZ & WILSON
711 NW 23rd Avenue, Suite 4
P. O. Box 1292
Gainesville, Florida 32602
(904) 378-2681
Counsel of Record for
Petitioner

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 85-3044
Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT WALTER GOVERN,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(June 28, 1985)

Before RONEY, FAY and JOHNSON, Circuit Judges.

JOHNSON, Circuit Judge:

This is an appeal from the denial of a motion for modification or reduction of sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure. In case No. 82-3167, this Court affirmed appellant's

conviction for marijuana trafficking, racketeering, and tax fraud. Following this affirmance and subsequent denials of appellant's petition for rehearing and suggestion for rehearing en banc, appellant filed a Rule 35 motion. The district court denied appellant's motion without a hearing, and this appeal ensued. The issue now presented is whether the district court's denial of appellant's Rule 35 motion without holding a formal evidentiary hearing and without making any findings relative to appellant's compliance or non-compliance with a "cooperation agreement" he made with the government -- an agreement not sanctioned by the court -- constituted a gross abuse of discretion. See United States v. Campbell, 711 F.2d 159, 160 (11th Cir. 1983).

In the cooperation agreement, appellant promised to testify for and otherwise

assist the Government in its investigation of marijuana smuggling operations about which he had knowledge. In exchange, the Government promised not to oppose a Rule 35 motion if proffered by appellant. When the present motion was submitted to the district court, however, the Government filed a written response in which it firmly opposed any reduction or modification of appellant's sentence. The Government argued that the appellant's motion misrepresented the extent of his involvement in marijuana trafficking between February 1979 and arrest in 1982. The Government listed testimony taken at appellant's trial that squarely contradicted his claim to have been "largely uninvolved" in the marijuana smuggling operation after February 1979. The Government also asserted in its written response that appellant had failed to provide truthful

information and to cooperate fully in the ongoing investigations. A provision in the agreement expressly conditioned the enforcement of its terms upon appellant's good faith compliance with his obligation to cooperate and testify truthfully and completely. In his reply, appellant acknowledged the record testimony as to his involvement in the smuggling operation after February 1979, but characterized this involvement as relatively minor when compared to his earlier smuggling activities. Appellant also claimed that, until he filed his Rule 35 motion, the Government had never contended that he had been uncooperative or had testified untruthfully. In support of the motion, appellant submitted a letter from a United States Attorney which relates that on one particular occasion appellant testified "fully and truthfully" before a federal grand jury.

The well-established rule is that one who brings a motion pursuant to Rule 35 is not entitled as a matter of right to a formal evidentiary hearing. Fournier v. United States, 485 F.2d 130,131 (5th Cir. 1973). The existence of factual disputes--i.e., whether appellant misstated his criminal involvement and failed to cooperate fully in compliance with the agreement -- does not, in this case, create an exception to the rule. Sentencing decisions, including whether to modify or reduce a particular sentence, are left to the broad discretion of the trial court. Requirements of due process and fundamental fairness dictate that appellant be given an opportunity to articulate his position and submit supporting materials, which he was permitted to do, but the district court retains broad discretion to prevent the sentencing process from becoming a full-scale adversarial

hearing. See, e.g., United States v. Espinoza, 481 F.2d 553, 558 (9th Cir. 1973). Having considered appellant's motion and supporting documents, the Government's response, and appellant's reply, the district court reached an adequately informed and clearly appropriate decision not to reduce or otherwise modify appellant's sentence.

Furthermore, even if after a hearing the district court had expressly found that appellant fully complied with the cooperation agreement his claim of a constitutional right to specific performance of the agreement, which by its nature entails the waiver of rights guaranteed by the Constitution, see Santobello v. New York, 404 U.S. 257, 264 (1971) (Douglas, J., concurring), is without constitutional significance standing alone. It must first be embodied in the judgment of a court, and although

specific performance of a plea agreement may be an appropriate remedy when the Government has breached the agreement, cf. Acosta v. Turner, 666 F.2d 949, 953 (5th Cir. 1982) (Unit B) (dicta), the Supreme Court has expressly declined to hold that specific performance is the constitutionally mandated remedy. Mabry v. Johnson, __U.S.__, ___, ___n.11, 104 S.Ct. 2543, 2546, 2548 n.11 (1984). Here, appellant waived no constitutional rights when he made the cooperation agreement; he had already been convicted and sentenced in the district court. Therefore, a favorable finding for appellant on the issue of his compliance with the cooperation agreement would not entitle him, as a matter of constitutional right, to specific performance of the agreement.

The district court did not commit a gross abuse of discretion in denying

appellant's motion without taking further evidence or making formal findings.

AFFIRMED.

[1] At most, specific performance of the cooperation agreement would merely require reconsideration of appellant's Rule 35 motion without opposition from the Government and before a different district judge. Cf. United States v. Ewing, 480 F.2d 1141, 1143 (5th Cir. 1973) (plea bargaining agreement). The agreement here did not and could not guarantee a reduced or modified sentence conditioned on appellant's cooperation.

Moreoever, to the extent the Government's response to appellant's motion simply corrected the representation that he had been "largely uninvolved" in marijuana smuggling activities after February 1979, it was not filed in opposition to the motion but rather was intended to

ensure that the court's decision would not be based on inaccurate information. Filing this sort of response would not be prohibited if appellant's motion were reconsidered. The Government attorney had an independent obligation to the court to correct this inaccuracy, which was done effectively through citations to record evidence. It is the duty of every attorney as an officer of the court to correct known misrepresentations of fact or law, and this duty cannot be abrogated by private agreement.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

UNITED STATES OF AMERICA

v. No. 82-3-Cr-Oc

ROBERT WALTER GOVERN, et al.

ORDER

The above-styled cause is before the Court on the motion of defendant, ROBERT WALTER GOVERN, for reduction or modification of sentence, filed October 26, 1984. After giving due consideration to the premises for said motion, the Court now:

ORDERS and ADJUDGES:

That defendant's, ROBERT WALTER GOVERN, motion for reduction or modification of sentence be and the same is hereby DENIED.

DONE and ORDERED in Chambers at Jacksonville, Florida, this 20 day of December, 1985.

UNITED STATES DISTRICT JUDGE

Copies to: All counsel of record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

UNITED STATES OF AMERICA

v. No. 82-3-Cr-Oc-16

ROBERT WALTER GOVERN

ORDER

The above-styled cause is before the Court on the motion of Defendant, ROBERT WALTER GOVERN, for reconsideration of the Order denying Defendant's motion for modification or reduction of sentence under Rule 35 of the Federal Rules of Civil Procedure, filed December 31, 1984.

It is ORDERED and ADJUDGED:

That Defendant's, GOVERN, motion for reconsideration of the Court's ruling on Defendant's Rule 35 motion to be and the same is hereby DENIED.

DONE and ORDERED in Chambers at Jacksonville, Florida this 10 day of

January, 1985.

/S/
UNITED STATES DISTRICT JUDGE

Copies to:

All Counsel of record

SCHWARTZ and WILSON
Attorneys at Law
711 N.W. 23rd Avenue, Suite 4
P.O. Box 1292
Gainesville, Florida 32602
Telephone (904)378-2681

June 23, 1983

John E. Lawlor, III, Esquire
Assistant United States Attorney
Post Office Box 600
Jacksonville, Florida

Re: Robert Walter Govern

Dear Mr. Lawlor:

This is to confirm our agreement concerning the cooperation of my client, Robert Walter Govern, which I understand to be as follows:

1. Pursuant to an Order of the District Court granting Mr. Govern derivative use immunity under 18 U.S.C. §6002, Mr. Govern shall submit to interviews with yourself and government agents in which upon request he will describe truthfully and completely

all matters within his knowledge. Mr. Govern shall have the right to be represented by counsel in any of these interviews.

2. Any statements made by Mr. Govern in these interviews shall be protected by the same derivative use immunity and rules of secrecy as would apply if he were testifying directly before the grand jury.

3. To more fully protect the secrecy of these interviews, the agents present at these interviews will be limited to agents of the grand jury, not to exceed a reasonable number in any interview, and specifically not to include Special Agent Favis of the Internal Revenue Service.

4. Mr. Govern shall testify when called upon in the future, be-

fore a grand jury or in any other proceeding, provided that such testimony is protected by a grant of derivative use immunity pursuant to 18 U.S.C. §6002.

5. In exchange for Mr. Govern's cooperation, the United States Attorney's Office will make known his cooperation to the Court, to individuals or entities responsible for determining parole or parole eligibility, or to any other authorities or officials who may have need of this information.

6. Should Mr. Govern apply for sentence reduction under Rule 35, Federal Rules of Criminal Procedure, the United States Attorney's Office shall expressly recommend that his sentence be modified to

include immediate eligibility for parole pursuant to 18 U.S.C. §4205(b)(2), but shall neither join in or oppose any request for further modification of Mr. Govern's sentence.

7. It is understood that Mr. Govern will not be questioned concerning Dianne Heimer, or persons whose involvement in any illegal activity was minor, peripheral, or remote in time.

8. It is understood that Mr. Govern is attempting to resolve his civil tax liability by direct negotiations with the Internal Revenue Service, and the United States Attorney's Office will not inhibit or oppose such resolution provided that it is not prejudicial to the interests of the Department of Justice.

9. This agreement is expressly conditioned on Mr. Govern's good faith compliance with his obligation to testify truthfully and completely under the terms set forth herein.

10. I have been authorized by my client to enter into this agreement on his behalf, and I understand that you have also been expressly authorized to enter into this agreement on behalf of the United States.

If you believe that the foregoing accurately reflects this agreement, please affix your signature below, and on each of the two attached duplicate originals of this letter. I understand that based on this agreement you will advise Judge Moore that you are withdrawing your motion to have Mr. Govern held in contempt.

Sincerely,

/S/

Grafton B. Wilson, II
Attorney for Robert Walter
Govern

ADOPTED:

/S/

John E. Lawlor, III
Assistant United States Attorney

U.S. DEPARTMENT OF JUSTICE

UNITED STATES ATTORNEY
MIDDLE DISTRICT OF FLORIDA

Orlando Division 305/420-6341
501 Federal Building
80 North Hughey Avenue
Orlando, Florida 32801

September 27, 1984

Robert L. Jennings, Esquire
Schwartz & Wilson
711 Northwest 23rd Avenue
Suite 4
Gainesville, FL 32601

Dear Mr. Jennings:

Pursuant to your request, this is to advise you that your client, Robert Govern, testified before a federal grand jury on June 20, 1984 in Orlando, Florida concerning an ongoing criminal investigation.

Rule 6(e) of the Federal Rules of Criminal Procedure prohibit me from disclosing the specific nature of the testimony, but I can state that it is my opinion that Mr. Govern testified fully and truthfully.

Very truly yours,

ROBERT W. MERKLE
United States Attorney

By /S/

Thomas W. Turner
Managing Assistant U.S. Attorney

TWT:ddd

cc: John Lawler, AUSA Jacksonville